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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No. 597

■

ADA McSPARRAN, *Petitioner*

v.

CITY OF PORTLAND, *Respondent*

■

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF OREGON

Petitioner's
MOTION FOR REHEARING

HAYDEN C. COVINGTON
Attorney for Petitioner

INDEX

Subject Index

	PAGE
Caption	*Front Cover*
This Index	i-iii
Grounds	2
Discussion and Reasons	3
Jurisdiction	3
The Merits	5
Conclusion	15
Certificate	16

Cases Cited

Allgeyer v. Louisiana 165 U. S. 579, 589	7
Atlantic Coast Line Ry Co. v. Powe 283 U. S. 401, 403	15
Bandini v. Superior Court 284 U. S. 8, 14	3
Berea College v. Kentucky 211 U. S. 45, 67	7
Brinkerhoff-Faris Tr. & Sav. Co. v. Hill 281 U. S. 673, 678-682	5
Brown v. Mississippi 297 U. S. 278	5
Chicago, etc. v. Industrial Comm. 284 U. S. 296	3
Cox v. State 312 U. S. 569, 574	10
Davis v. Wechsler 263 U. S. 22, 24	5

PAGE

Department of Banking v. Pink
63 S. Ct. 233, 235 5
German Savings and Loan Soc. v. Dormitzer
192 U. S. 125, 128 5
Hamilton-Brown Shoe Co. v. Wolf Bros. Co.
240 U. S. 251, 258 15
Hardwicke v. Board of School Trustees
54 Cal. A. 696, 205 P. 49 7
Herndon v. Lowry
301 U. S. 242 12
Herold v. Parish Board
136 La. 1034, 68 S. 16 7
Kentucky v. Powers
201 U. S. 1, 37 3
Largent, Ex parte
162 S.W. 2d 419, 421 4
Largent v. Texas
.... U. S. ...., 63 S. Ct. 667 4
Lawrence v. State Tax Commission
286 U. S. 276, 283 5
Lefebvre, In re
20 A. 2d 185 10
Love v. Griffith
266 U. S. 32 5
McMaster v. Gould
276 U. S. 284 3,5
Meyer v. Nebraska
262 U. S. 390 7
Missouri etc. v. Gehner
281 U. S. 313 5
N.Y.C. Ry. Co. v. N.Y. & Pa. Co.
271 U. S. 124, 126-127 5
Ohio ex rel. Seney v. Swift & Co.
260 U. S. 146, 151 15

PAGE

Patterson v. Alabama
294 U. S. 600, 603-607 5
People v. Board of Education
245 Ill. 334, 92 N.E. 251 7
People of N. Y. ex rel. Bryant v. Zimmerman
278 U. S. 63, 70-71 5
People ex rel. Vallmar v. Stanley
81 Colorado 276, 282, 265 P. 610 7
Pierce v. Society of Sisters
268 U. S. 510 6
Rogers v. Alabama
192 U. S. 226, 230-231 5
Schneider v. State
308 U. S. 147 12
Skinner v. Oklahoma
316 U. S. 535 7
Spiller v. Woburn
12 Allen (Mass.) 127 7
State ex rel. Finger v. Weedman
55 S. Dak. 343, 226 N.W. 348 7
State v. Richardson
27 A. 2d 94 10
State v. Schieve
91 N.W. 846 (Neb.) 7
Stone v. Stone
.... Wash. ...., 133 P. 2d 526 11
United States v. Carolene Products Co.
304 U. S. 144, 152 12
United States v. Carver
260 U. S. 482, 490 15
Weiss v. School District
76 Wisc. 177 7
Western Union Telegraph Co. v. Priester
276 U. S. 252 3

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MAY IT PLEASE THE COURT:

Now comes Ada McSparran, petitioner, and presents this her motion for rehearing within the time fixed by order of this Court extending time and as grounds therefor shows:

Grounds

1. This Court should have exercised discretionary jurisdiction because the state court below failed to hold that the ordinance as construed and applied abridges petitioner's rights of freedom to bring up children in the nurture and admonition of the Lord and to direct the spiritual welfare of said children and their proper worship of Almighty God JEHOVAH as directed in His Word, contrary to the First and Fourteenth Amendments to the United States Constitution.

2. This Court should have exercised discretionary jurisdiction because the state court below failed to hold that the ordinance as construed and applied abridges petitioner's and her children's rights of freedom of speech, press and worship of Almighty God, contrary to the First and Fourteenth Amendments to the United States Constitution.

3. This Court should have exercised discretionary jurisdiction because there are "special and important reasons" in that the court below has decided a federal question of substance of national importance not heretofore determined by this Court and *in a way not in accord with the United States Constitution.*

4. This Court should have exercised discretionary jurisdiction because the petition for writ of certiorari was timely filed, directed to the court possessing the record, to review the judgment of the Circuit Court of Multnomah County, Oregon.

DISCUSSION AND REASONS

Jurisdiction

The last ground is discussed first because if the conclusion is reached that the Court does not have jurisdiction then it is unnecessary to consider whether or not a substantial federal question is presented.

At the time of petitioner's appeal to the Oregon Supreme Court it was not settled that an appeal did not lie to that court to review the judgment. Dictum in the case of *Portland* v. *White,* 106 Or. 169, 211 P. 798, stated that where a constitutional question was presented an appeal would lie from the Circuit Court of a case originating in the Municipal Court. Because of the language and inferences of this case petitioner considered it necessary to exhaust her remedies by appeal in the state courts before bringing the case to this Court for review.

It was universally accepted among the bench and bar of Oregon at the time of the order dismissing the appeal in the case at bar that an exception existed allowing an appeal in the case of a constitutional question based upon the dictum in *Portland* v. *White,* supra.

Therefore it was at last the duty of petitioner to permit the Supreme Court of Oregon to express itself in the matter as to whether or not it would take jurisdiction. In *Kentucky* v. *Powers,* 201 U. S. 1, 37, this step is approved by this Court. Cf. *Bandini* v. *Superior Court,* 284 U. S. 8, 14. The cases relied upon by respondent against the jurisdiction of this Court[1] do not control here. They were cases dealing

[1] *Western Union Tel. Co.* v. *Priester,* 276 U. S. 252; *Chicago,* etc. v. *Industrial Com.,* 284 U. S. 296; and *McMaster* v. *Gould,* 276 U. S. 284.

with the question of whether or not the "writ" had been issued to the proper court. The only problem considered here is whether or not the petition is timely filed within 90 days from the date the judgment of the Circuit Court became final. The said judgment did not become final until September 22, 1942, the date of dismissal of the appeal. The petition is filed within three months of such date. The Supreme Court of Oregon says: "In the instant case, the circuit court is the highest state court in which a final decision could be had, and hence, the right of review above mentioned is not affected by the dismissal of this appeal. See authorities cited in annotations to said section 344 of the United States Judicial Code." R. 96.

The decision in *Largent* v. *Texas,* 63 S. Ct. 667, does not dispose of the question of whether or not this petition is timely. What was held there was that the judgment was final and the highest court was the county court. There the question of further review had been definitely settled in *Ex parte Largent,* 162 S. W. 2d 419, 421, prior to the judgment of the County Court. In Oregon at the time of the *McSparran* appeal, that State's Supreme Court had not clarified the law in the manner that the Texas Court of Criminal Appeals had done.

Litigants have the right to rely upon dictum of opinions of the highest court of the state in determining what step is required under the procedure of a state and until such dictum as to the procedure is overruled the taking of such course dictated by such dictum is proper; and the fact that the highest court of the state later denies legal effect to such dictum and overrules the suggested procedure of the state courts that existed prior to the decision overruling such dictum would control the question of whether or not the petition for certiorari is timely. Were the rule otherwise, state courts could repeatedly change the procedure and thus set snares and traps for litigants so as to deny them their rights to invoke the appellate jurisdiction of this Court

to protect rights secured under the Federal Constitution.[2]

The appeal was properly taken to the Supreme Court of Oregon on authority of *McMaster* v. *Gould,* supra, which held it necessary to apply to the Court of Appeals of New York from an order of the Appellate Division refusing further appeal. *Department of Banking* v. *Pink,* 63 S. Ct. 233, 235, does not apply here but sustains the direction of the writ to the Supreme Court of Oregon to review the judgment of the Circuit Court. The writ here is to be directed to the court possessed of the record, the State Supreme Court.

The Merits

Petitioner complained that the ordinance as construed and applied abridged her rights of freedom of speech and freedom of worship (or "religion"). (R. 2, 58, 60, 61, 66, 68) These rights include the right to educate and bring up her children in the "most holy faith" as Jehovah's witnesses, which had been impaired. Therefore grounds 1 and 2, page 11 of the petition for certiorari, are supported by the record. The petitioner had a right to exercise those two freedoms in the discharge of the duty of her relationship as mother to her children. It is her constitutional right to educate her children to be Jehovah's witnesses, which required the exercise of freedom of speech and of worship, and these rights have been impaired.

[2] *Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 281 U. S. 313; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 678-682; *People of New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 70-71; *Rogers v. Alabama,* 192 U. S. 226, 230-231 (Motion to quash struck because prolix and verbose); *Davis* v. *Wechsler,* 263 U. S. 22, 24 (Waiver of venue by appearance); *Love* v. *Griffith,* 266 U. S. 32 (Appeal dismissed because moot question); *N. Y. C. Ry. Co.* v. *N. Y. & Pa. Co.,* 271 U. S. 124, 126-127 (Federal question not waived because of failure to appeal from former ruling); *German Savings & Loan Soc.* v. *Dormitzer,* 192 U. S. 125, 128 (Estoppel not sufficient); *Postal T. & C. Co.* v. *Newport,* 247 U. S. 464, 473, 475-476 (Res judicata, estoppel and waiver through agreement); *Brown* v. *Mississippi,* 297 U. S. 278 (Failure to move to exclude evidence); *Patterson* v. *Alabama,* 294 U. S. 600, 603-607 (Striking of motion for new trial and the bill of exceptions containing evidence); *Lawrence* v. *State Tax Com.,* 286 U. S. 276, 282-283.

CHILD LABOR LAWS of the sort involved here were designed to protect children from economic exploitation. They were not designed to invade the realm of education and raising of children by parents. The law in question is a restrictive measure, that is to say, a law that prohibits certain evils to children. It is not, therefore, an affirmatively constructive, or *positive,* measure of the legislature.

The ordinance in question is a part of the social legislation planned and enacted in the various states of the Union to prevent the *exploitation* of children in any line of work.

The right of the State to protect the children does not give the State a property right in or to the children, nor does the State have the right to invade the sacred field of obligation and relationship between parent and child and the family relationship. Those sacred relationships have been historically recognized as the very basis of society itself and without which mankind cannot exist, and would ultimately slide into barbarism of the worst kind.

It is true that statements can be found in the reports to the effect that the children are the wards of the State; but this does not mean that the State has absolute and unlimited control of all the children within its boundaries. This untenable, ridiculous position is claimed by the respondent, City of Portland, in its brief. There is a definite dividing line between powers of the State and the power of the parents in reference to the upbringing of children and providing education for such children. The proper field of the parent cannot be invaded by any sort of law *regardless of legislative declarations of policy* and recorded good motives behind the legislation.

This Court has uniformly held that every person within the boundary of the United States has an absolute constitutional right to marry, to pursue an occupation or calling of his own choice, maintain a home, raise children, teach his children in the way that they should go and direct their education and conduct. This was specifically held in *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Meyer* v. *Nebraska,* 262

U. S. 390; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Berea College* v. *Kentucky*, 211 U. S. 45, 67.[3]

Cf. *Skinner* v. *Oklahoma*, 316 U. S. 535.

The power of the State to require compulsory education and to direct the course of education of children in the public schools has been forced, in many instances, to yield to the stronger and more vital right of the parent to direct the education of the children in matters pertaining to the Bible and the faith or religion of such individuals.[4]

If the educational policy of the State must yield to the consciences of the children and parents then with equal force of reason it must be said that the power of the State to enforce restrictive legislation designed to curb child labor cannot be applied, and when applied must yield to the right of the parent to direct the child to engage in practices, service and worship voluntarily rendered by the child and considered (by both the child and its parents) necessary discharge of its obligations due the Creator.

Like any other constitutional right this right of bringing forth children, maintaining a family and directing the education of the little ones is not absolute. The State can intervene when and only when there is an *abuse* on the part of the parent of the exercise of the right, duty and privilege of controlling the child. There must be a positive showing that the parent's manner of exercising control over the child is an *abuse* of the right and so greatly jeopardizes the welfare of the child as to require intervention on the part of the State. It is admitted that there is no such *abuse* of the parental control in this case as would justify an invasion on the part of the State.

[3] For quotations from these cases that are pertinent here, see Appellees' brief in case of *West Virginia State Board of Education* v. *Barnette*, No. 591 October Term 1942, pages 42-44, 47-48.

[4] *People ex rel. Vallmar* v. *Stanley*, 81 Colo. 276, 282, 265 P. 610; *State ex rel. Finger* v. *Weedman*, 55 S. Dak. 343, 226 N. W. 348; *Spiller* v. *Woburn*, 12 Allen (Mass.) 127; *State* v. *Schieve*, 91 N. W. 846 (Nebr.); *Weiss* v. *School District*, 76 Wisc. 177; *People* v. *Board of Education*, 245 Ill. 324, 92 N. E. 251; *Herold* v. *Parish Board*, 136 La. 1034, 68 S. 16; *Hardwicke* v. *Board of School Trustees*, 54 Cal. A. 696, 205 P. 49.

Petitioner was not exploiting the children in any labor, commercial enterprise or pursuit. Neither she nor her children were engaged in any business. They were honestly and conscientiously engaged in preaching the Gospel of God's Kingdom and in discharging their covenant obligations to carry to others the message of God's Kingdom, The THEOCRACY, as the only hope of relief for the sufferings of humanity. By preaching publicly they were following in the footsteps of Jesus Christ and His apostles. The magazines which they were distributing related exclusively to explanation of Bible prophecy as understood and believed by petitioner and her children. This matter has been fully explained in the petition for writ of certiorari and the Court's attention is again directed to pages 4-7, 9-10, and 12-21 thereof.

If the doctrine contended for by respondent be sustained then family relationships will no longer be secure. Children can be pulled away from their mother's breast by legislative fiat and denied the nurture, comfort and admonition of parents and the warmth of fatherly and motherly instruction in all matters of human affairs and life, and of even the Bible, on the ground that the children are "wards of the State". This is a very dangerous, pernicious and alien fallacy and is a counterpart of the Nazi precept that the children are the exclusive property of the State and that the parents are only animal agencies to bring the children into existence for the benefit of the State.

It is not contended that the children of petitioner did not engage in sports with other children. The record does not show that they have been truant from school nor neglectful of studies. It is not contended that the children were not healthy or that the activity in which they engaged with their mother caused them to become stolid, intolerant and unresourceful. It is not shown that the activity in any way impaired the education, morals, welfare, physical or mental capacity, of the children. The only argument advanced against these children is that they are being brought up as

Jehovah's witnesses with baneful results to the children because such will cause them to be intolerant toward others. If this argument be sustained, then the children of all Catholics could be taken away from their parents in a predominantly Protestant community, or vice versa.

The State is shorn of all power and authority, therefore, to intervene in the Godly education by the parent of the child in the Bible and cannot interfere with the worship, service or Christian practices of the parent and child so long as such does not involve a violation of the law of morals or break out into overt acts against the peace and safety of the State and Nation. No such condition exists in the case at bar.

It is true that the State has the authority to prescribe compulsory education and punish children and parents for wilful truancy, dependency and delinquency, but no such condition exists here.

The power of control of the parent and especially that of the father over the children has been from time immemorial under the common law, the Roman law, the Hebrew law and the law of Almighty God, recognized as supreme. It was despotic until the child reached a certain age fixed by law or statute. These powers have been considerably relaxed to meet the change of the times, but even under the modern law the power of the parent as the natural guardian of children during minority has not been abrogated. During minority the parent has control over the person and property of the children except such property as is held in trust. Universally the father may restrain the liberty of children and even administer corporal punishment and the State cannot intervene or interfere by statute or criminal law unless such chastisement be excessive or cruel. Until quite recently the father had power to bind out his sons as apprentices and, though this right has generally discontinued under the law, the father is still entitled to the earnings of his minor child so long as the child remains at home and has not been emancipated. The issuance of licenses to marry

in cases of minors is generally forbidden unless parental consent has been given and marriages without such consent are voidable at the instance of the parent and as to certain legally defined ages some marriages are absolute nullities. With this power to the parent goes the obligation, enforceable by law, to support, maintain and provide for the needs of minor children.

The Court is well aware of these legal obligations and relationships between the parent and children but they are mentioned here for the purpose of emphasizing the fact that the State does not have absolute control, that is to say, the parent does not derive his authority over the children by virtue of any grant or allowance from the State, but that such powers of control over the children have been recognized as fundamental personal rights inherent with the parent from time immemorial.

Petitioner did not have her children on the streets on a day when their attendance was required at school, but petitioner and her children were upon the sidewalks of the City of Portland on Saturday, September 13, 1941, at about 9:30 a.m. This was a school holiday.

The respondent criticizes the two New Hampshire Supreme Court cases relied upon by petitioner, *In re Lefebvre,* 20 A. 2d 185, and *State* v. *Richardson,* 27 A. 2d 94, involving laws substantially identical with that questioned here. The facts in the *Richardson* case are directly in point with the facts here. In principle the *Lefebvre* case controls here. The respondent says that the Supreme Court of New Hampshire would not have favorably "commented if the court had been familiar with the activities of Jehovah's witnesses and with the doctrines advanced in their magazines and books", and then cites and quotes from the case of *Cox* v. *State,* 312 U. S. 569, 574, which is not at all in point here. It can be reliably stated that, aside from the Supreme Court of the United States, the Supreme Court of the State of New Hampshire knows more about Jehovah's witnesses than any other court in the United States because it has had

under consideration more cases involving Jehovah's witnesses than any other high state court.

Respondent quotes from the opinion of the judge of the Superior Court in the case of *Stone* v. *Stone,* involving one of Jehovah's witnesses who had the custody of her children taken away from her in a divorce proceeding on the ground that she was one of Jehovah's witnesses and taught her children to be likewise. (Page 28, respondent's brief) On January 25, 1943, that decision was reversed unanimously by the Supreme Court of Washington, 133 P. 2d 526.

The respondent leans heavily upon the doctrine of presumption of constitutionality of legislation, statutes and ordinances as a refuge from the constitutional assault against the illegal and unconstitutional application of this ordinance. To begin with we assert that the presumption of constitutionality cannot exist and does not prevail where an ordinance is attacked as being unconstitutional as construed and applied. This presumption should apply only where the statute or ordinance is attacked as being void on its face. It is uniformly the rule that where legislation is applied to activity of this character it comes directly in conflict with the provisions of the First and Fourteenth Amendments and immediately this presumption of constitutionality vanishes. The burden then falls upon the proponents of the legislation to justify an abridgment of the constitutional rights. The respondent has wholly failed to discharge the burden placed upon the City of Portland in this regard and has contented itself to criticize the doctrines and precepts of the Holy Bible as revealed to the people through Jehovah's witnesses. That sort of argument might pull the unsuspecting one away from the real issue but this Court will not be deceived and blinded to the true legal issue.

As a matter of fact when, as here, legislation is shown to abridge activity admittedly protected by the Constitution, there immediately results a presumption of unconstitutionality. This Court, in *Schneider* v. *State,* 308 U. S.

147, held that legislative preferences respecting matters of public convenience supporting application thereof to "other personal activities" would not justify application thereof to the four freedoms protected by the Bill of Rights and the Fourteenth Amendment. In the case of *Herndon* v. *Lowry,* 301 U. S. 242, this Court said:

> "The power of a state to abridge freedom of speech . . . [press and worship of Almighty God] is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state."

In *United States* v. *Carolene Prod. Co.,* 304 U. S. 144, 152, Chief Justice Stone, speaking for the Court, said:

> "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See Stromberg v. California, 283 U. S. 359, 369-370; Lovell v. Griffin, 303 U. S. 444, 452.
>
> "It is unnecessary to . . . enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

If it be held that presumption of validity of legislation prevails in situations of this kind, then readily it becomes

apparent that the legislature can issue fiats and make declarations of policy, enforced with extreme penalties and punishment, prohibiting altar boys, choir singers, etc., regimenting the life and education of all children, invading the sanctity of the home and dictating to parents and to children alike as to the most delicate of all intricate human relationships, thus breaking down the dignity and sanctity of the American home, the backbone of democracy.

In these perilous times, with the rising tide of juvenile delinquency due to disruption of home conditions flowing from total war in which the Nation is engaged, it is more important than ever before to take every safeguard to maintain and preserve the family tie and relationships between parent and children. So important is this delicate and vital human relationship that the Office of Civilian Defense, through James M. Landis, Director, and the Children's Bureau of the United States Department of Labor are co-operating to stop the breakdown of family relationship by sustaining a nation-wide program of emphasizing the spiritual foundation of the family.

It is recognized that the place of Christianity and Bible instruction by the parent is the principal binding tie in establishing and maintaining the home and fulfilling family life. The interdependence of the parent and the Christian organization with which he is affiliated, as they seek common values and share in discharging the responsibilities of Bible education of the children, must be maintained. It is now admitted that the resources of the faith in Christianity must be mobilized to enable the people to meet the anxieties, privations, separations and bereavements that come from total war.

No child is expendable in the eyes of Almighty God through neglect of the parent to properly instruct him. By the law of Almighty God parents are obligated first to shoulder the task of educating the children and setting the example in morality, honesty, integrity, etc., which guides the children to maturity and soundness of mind.

There is no care so good and helpful as the care that devoted parents can give the children. The cold, disinterested arm of the State can never substitute for the warm embrace of loving father and mother. Legislative fiats and regimented instruction of paid instructors at state schools for delinquents cannot substitute for the nurture and admonition of a Christian father and mother which build the children's security to begin a well-balanced, normal, adult life.[5]

While the great majority of persons who adhere to "recognized" religions of America would not and do not agree with petitioner as to this method of worship of Almighty God indulged in by petitioner and her children, not one would have the hardihood to claim that this practice is an *abuse* of the fundamental right of a person to raise a family "in the Lord".

The approval of the conviction of this honest God-fearing parent because of her efforts to strengthen the faith of her children in Jehovah God is to make a mockery out of justice and the sanctity of family relationship in America. The conviction does not do honor nor lend credit to the nation-wide celebration of *National Family Week*, May 2-9, 1943, which is being backed and advanced throughout the Nation by the Office of Civilian Defense, and other civic organizations for the purpose of strengthening the morale of the people so as to strengthen the effort to preserve the sanctity of the family relationship during this hour of great peril.

[5] *In re Lefebvre*, supra.

Conclusion

If this Court dismissed the petition for writ of certiorari for want of jurisdiction because the petition was not filed within 90 days of the date of judgment of the Circuit Court of Multnomah County, Oregon, then, of course, it is beyond the power and reach of the Court to rectify the unlawful encroachment upon the liberties of petitioner, contrary to the Constitution.

However, if the Court denied the writ under its general discretionary powers [6] to refuse to review the judgment because there was no opinion on the merits by the Supreme Court of Oregon and because apparently the question is purely one of local concern, then it is important that the Court be appraised of the national implication of this question. If it is not settled in this case, it will have to be faced and settled in some future case, because *the problem is not local but entirely national in scope.* At present parents, Jehovah's witnesses, have been prosecuted or are threatened with prosecution under the Child Labor Laws in the states of Alabama, California, Massachusetts and Michigan. Prosecutions under statutes in those states involving the same facts as are involved in this case are gradually winding their way through the courts and will ultimately reach this Court. The quicker the issue is disposed of the better it will be for all concerned.

WHEREFORE, petitioner prays that the orders and judgments heretofore entered in the above entitled and numbered cause denying certiorari be set aside and held for naught and that on this motion for rehearing, the petition for writ of certiorari, and the supporting brief, the Court issue a writ of certiorari to the Supreme Court of Oregon, directing such court to certify to this Court for review and determination on a day certain to be therein named, a full

[6] *United States* v. *Carver,* 260 U. S. 482, 490; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U. S. 251, 258; *Ohio ex rel. Seney* v. *Swift & Co.,* 260 U. S. 146, 151; *Atlantic Coast Line R. Co.* v. *Powe,* 283 U. S. 401, 403.

and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court, containing a copy of the judgment of conviction rendered and entered by the Circuit Court of Multnomah County, Oregon, against petitioner; and that the decree of the said Circuit Court convicting petitioner be reversed and that your petitioner have such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

Respectfully submitted,

HAYDEN C. COVINGTON
117 Adams St., Brooklyn, N. Y.
Counsel for Petitioner

Certificate

I, Hayden C. Covington, do hereby certify that the foregoing motion for rehearing is prepared and filed in good faith so that justice may be done and not for the purpose of delay.

HAYDEN C. COVINGTON
Counsel for Petitioner